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REPORT OF THE WORKING GROUP ON INSOLVENCY LAW ON THE WORK OF ITS TWENTIETH SESSION (Vienna, 7-18 October 1996)

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INTRODUCTION

1. At the present session, the Working Group on Insolvency Law continued its work, undertaken pursuant to a decision taken by the Commission at its twenty-eighth session (Vienna, 2-26 May 1995) on the development of a legal instrument relating to cross-border insolvency. [1] That was the third session that the Working Group devoted to the preparation of that instrument, tentatively entitled the draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency.

2. The Commission's decision to undertake work on cross-border insolvency was taken in response to suggestions made to it by practitioners directly concerned with the problem, in particular at the UNCITRAL Congress, "Uniform Commercial Law in the 21st Century", held in New York in conjunction with the twenty-fifth session of the Commission, from 18 to 22 May 1992.[2] The Commission decided at its twenty-sixth session in 1993 to pursue those suggestions further.[3] Subsequently, in order to assess the desirability and feasibility of work in that area, and to define appropriately the scope of the work, UNCITRAL and the International Association of Insolvency Practitioners (INSOL) held a Colloquium on Cross-Border Insolvency (Vienna, 17-19 April 1994), involving insolvency practitioners from various disciplines, judges, government officials and representatives of other interested sectors including lenders.[4]

3. The first UNCITRAL-INSOL Colloquium gave rise to the suggestion that work by the Commission should, at least at the current stage, have the limited but useful goal of facilitating judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings. Subsequently, an international meeting of judges was held specifically to elicit their views as to work by the Commission in that area (UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency (Toronto, 22 - 23 March 1995).[5] The view of the participating judges and government officials concerned with insolvency was that it would be worthwhile for the Commission to provide a legislative framework, for example by way of model legislative provisions, for judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings.

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[1] Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 382-393.

[2] A/CN.9/SER.D/1 United Nations publication, sales No. E.94.V.14, page 274.

[3] Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 302-306. The background note on which the Commission based its discussion is contained in document A/CN.9/378/Add.4.

[4] The report on the Colloquium is found in document A/CN.9/398.

[5] The report of the Judicial Colloquium is found in dicument A/CN.9/413.

4. At its eighteenth session, the Working Group considered the possible issues to be covered in a legal instrument dealing with judicial cooperation and access and recognition in cross-border insolvency.[6]

5. At its nineteenth session, the deliberations of the Working Group focused on provisions, tentatively in the form of model legislative provisions, addressing issues including: definitions of certain terms; rules on recognition of foreign proceedings; relief afforded upon recognition; modalities of court access for foreign insolvency representatives; and judicial cooperation and coordination in the context of concurrent proceedings.[7]

6. The Working Group, which was composed of all States members of the Commission, held the present session at Vienna from 7 to 18 October 1996. The session was attended by representatives of the following States members of the Working Group: Argentina, Australia, Austria, Chile, China, Ecuador, Egypt, Finland, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Nigeria, Poland, Saudi Arabia, Singapore, Slovakia, Spain, Sudan, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland and United States of America.

7. The session was attended by observers from the following States: Azerbaijan, Belarus, Canada, Indonesia, Israel, Kazakstan, Kuwait, Lebanon, Netherlands, Republic of Korea, Romania, South Africa, Switzerland, Uzbekistan and Yemen.

8. The session was also attended by observers from the following international organizations: International Monetary Fund (IMF), European Insolvency Practitioners Association (EIPA), Fédération Bancaire de l'Union Européenne, International Bar Association (IBA), International Federation of Insolvency Practitioners (INSOL), International Women's Insolvency and Restructuring Confederation and Union Internationale des Avocats (UIA).

9. The Working Group elected the following officers:

Chairman: Ms. Kathryn Sabo (Canada)

Rapporteur: Mr. Ricardo Sandoval (Chile)

10. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.V/WP.45) and a note by the Secretariat containing revised articles of the draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency (A/CN.9/WG.V/WP.46), which was used as a basis for the Working Group's deliberations.

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[6] The report of that session is found in document A/CN.9/419.

[7] The report of that session is found in document A/CN.9/422.

11. The Working Group adopted the following agenda:

1. Election of officers

2. Adoption of the agenda

3. Cross-border insolvency

4. Other business

5. Adoption of the report.

I. DELIBERATIONS AND DECISIONS

12. The Working Group considered the revised articles of the draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency presented in the note prepared by the Secretariat (A/CN.9/WG.V/WP.46).

13. As the Working Group progressed with its consideration of document A/CN.9/WG.V/WP.46, it established an informal drafting group to revise the draft Model Legislative Provisions, reflecting the deliberations and decisions that had taken place. The Working Group expressed its appreciation to the drafting group for its work and, since there was no time to consider the texts prepared by the drafting group at the current session, decided to consider those texts at its twenty-first session, which would take place in New York from 20 to 31 January 1997. The deliberations and conclusions of the Working Group, including its consideration of various draft provisions, are set forth below in chapter II.

II. DRAFT UNCITRAL MODEL LEGISLATIVE PROVISIONS ON CROSS-BORDER INSOLVENCY

A. General remarks

14. It was considered that the draft Model Legislative Provisions before the Working Group reflected the general aims and principles that had so far guided the Working Group. It was hoped that those provisions would gain wide acceptance and that they would be taken into account by national legislators when revising their laws on insolvency.

15. The Working Group was reminded of the need for developing mechanisms that would represent an improvement in the way national laws currently dealt with the issues raised by cross-border insolvencies. Thus far the Working Group had aimed at achieving that result by means of a text that addressed the essential issues raised by cross-border insolvencies without being unnecessarily complex or ambitious.

Form of instrument

16. The Working Group also considered the question of the form of the instrument being prepared. It was noted that, as a working assumption, the draft text before the Working Group had been presented by the Secretariat in the form of model legislative provisions. Such a form, which would not preclude an eventual decision to transform the text into a draft convention, had taken into account the considerations that had been cited during the nineteenth session of Working Group in favour of model legislation.

17. However, arguments were raised in favour of the use of the form of a draft convention. It was considered that the form of a convention was more appropriate than the form of model legislative provisions for dealing with the issues in question, which concerned essentially international judicial cooperation. It was stated that such issues required a higher degree of uniformity, which could not be achieved by means of a model law, since States remained free to introduce substantive changes to its text, when implementing a model law. It was also pointed out that in some jurisdictions the cooperation with foreign judicial authorities was traditionally subject to the requirement of reciprocity. It was further stated that, while in the case of international conventions it could be easily proved that the requirement of reciprocity was satisfied, such proof would be more difficult in the case of model legislation. Moreover, it was said that in the field of cross-border insolvency, a convention might be more complex to elaborate than a model law, but it would be easier to implement.

18. In connection with the arguments that had been raised in favour of the form of a draft convention, it was suggested that the Working Group should consider the desirability of formulating model treaty provisions that could be offered to States wishing to enter into bilateral or multilateral agreements on judicial cooperation regarding cross-border insolvency. That would allow the Working Group to proceed with the consideration of the draft Model Legislative Provisions, without limiting its work to such a form.

19. In response it was considered that it would not be realistic for the Working Group, at the present stage, to venture into the formulation of a text other than model legislative provisions. In support of that view, it was stated that attempts at unification and harmonization of the subject which had been previously undertaken at a regional or international level, had had limited success. Furthermore, model legislative provisions constituted a less ambitious and more flexible instrument for legal harmonization and might, therefore, be more effective in a field where conventions had so far failed to achieve the desired objectives. As regards the question of reciprocity, it was pointed out that national laws often contemplated different notions of reciprocity so that no single solution could be easily provided, even in the form of a convention. In the case of model legislation, on the other hand, it would still be possible for those States which wished to do so, to subject its application to the rule of reciprocity, by listing those jurisdictions with regard to which the requirements of reciprocity had been fulfilled.

20. After considering the various views expressed, the Working Group decided to continue and complete its work on the draft Model Legislative Provisions. That would not exclude the possibility of undertaking work towards model treaty provisions or a convention on judicial cooperation in cross-border insolvency, if the Commission at a later stage so decided.

B. Consideration of draft provisions

Preamble

21. The text of the preamble as considered by the Working Group read as follows:

"WHEREAS the [Government] [Parliament] of the enacting State considers it desirable to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

"(a) Fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested parties [whether or not resident, domiciled or with a registered office in the enacting State];

"(b) Facilitating the gathering of information about the debtor's assets and affairs, and protecting and maximizing the value of the debtor's assets for the purposes of administering a cross-border insolvency;

"(c) Facilitating the rescue of financially troubled though viable businesses, thereby protecting investment and preserving employment;

"(d) Encouraging and providing a predictable environment for trade and investment in the enacting State; and

"(e) Furthering cooperation between the courts and other competent authorities of States affected by cases of cross-border insolvency.

"Be it therefore enacted as follows."

22. It was decided to move subparagraphs (d) and (e) to the beginning of the preamble and reverse their order since it was considered that they contained more general statements of the purpose of the Model Provisions than the remaining subparagraphs of the preamble.

23. As regards the wording in square brackets in subparagraph (a), it was suggested that such wording might not be necessary. However, if the Working Group decided to retain the text in square brackets, reference should be added to the nationality of creditors, so as to make it clear that the draft model legislative provisions were also to apply without discrimination based on the nationality of creditors.

24. Support was expressed for the deletion of the text in square brackets. It was pointed out that, as currently worded, that text might be interpreted as not excluding discrimination based on grounds other than those mentioned therein. The addition of reference to nationality, while providing clarification as to the scope of the provision, would not solve that problem, since it was in practice not possible to provide an exhaustive list of all possible types of discrimination.

25. After having considered a number of proposals for redrafting subparagraph (a), the Working Group agreed to delete the text in square brackets and to add the word "all" before the word "creditors". The addition of that word was considered to be sufficient for the purpose of clarifying that the model legislative provisions were intended to protect the interests of creditors without any form of discrimination based on nationality, residence, domicile or other factors.

26. As regards subparagraph (b) it was felt that it should highlight the aim of protecting and maximizing the value of the debtor's assets and that that could best be achieved by deleting the words "for the purposes of administering a cross-border insolvency".

27. In respect of subparagraph (d), it was considered that the phrase "providing a predictable environment for trade and investment in the enacting State" did not constitute an appropriate statement of the scope of the draft model legislative provisions, which were actually aimed at achieving greater legal certainty in cross-border insolvencies. The Working Group agreed with that consideration and referred subparagraph (d) to the drafting group.

28. It was decided that, throughout the text of the draft Model Provisions, the expression "the enacting State" should be replaced with the words "this State", which was deemed to be more appropriate for model legislative provisions. The guide to enactment should explain that the national law enacting the Model Provisions might use another expression customarily used to refer to the enacting State.

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application

29. The text of the draft article as considered by the Working Group was as follows:

" [Law] [Section] applies where:

"(a) A foreign proceeding has been commenced and recognition of that proceeding and assistance for the court or a foreign representative in that proceeding is sought in the enacting State; or

"(b) A proceeding is taking place in the enacting State under [insert names of applicable laws of the enacting State relating to insolvency] and assistance with respect to that proceeding is sought from a foreign court;

"(c) A foreign proceeding and a proceeding in the enacting State in respect of the same debtor under [insert names of applicable laws of the enacting State relating to insolvency] are taking place concurrently."

30. While some hesitation was expressed as to the need for article 1 (on the ground that the article did not provide for anything that was not provided for in the subsequent provisions), the Working Group was of the view that, in order to describe clearly and succinctly the situations covered by the draft Model Provisions, the article was useful.

31. The Working Group noted that an additional situation covered by the draft Model Provisions was one where creditors in a foreign State had an interest in requesting the opening of, or in participating in, an insolvency proceeding in the enacting State. It was decided that a subparagraph should be added to reflect that situation.

32. The article was referred to the drafting group for review and implementation of the Working Group's decision.

Article 2. Definitions and rules of interpretation

33. The text as considered by the Working Group was as follows:

"For the purposes of this Law:

"(a) 'Foreign proceeding' means a collective judicial or administrative proceeding pursuant to a law relating to insolvency in a foreign State in which proceeding the asset and affairs of the debtor are subject to control or supervision by a foreign court or other competent authority, for the purpose of reorganization or liquidation [provided that the debts were not incurred predominantly for household or other personal rather than commercial purposes];

"(b) 'Foreign representative' means a person or body authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;

"[(c) 'Opening of foreign proceedings' is deemed to have taken place when the order opening the proceedings becomes effective, whether or not [final][subject to appeal;]

"(d) 'Court' in references to a foreign court is deemed to include a reference to the competent foreign authority other than a court, when such authority is competent to carry out functions referred to in this Law;

"(e) 'Establishment' means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods."

Subparagraph (a)

34. As regards subparagraph (a), it was suggested that, in view of the distinction established in article 11 between a "foreign main proceeding" and a "foreign non-main proceeding", a corresponding definition of those terms should be contained in subparagraph (a). However, the prevailing view was

that subparagraph (a) contained a general definition and that including the proposed details would render the provision excessively complex. It was pointed out that the distinction between a "foreign main proceeding" and a "foreign non-main proceeding" was only relevant within the context of article 11 and that the question of whether it was necessary to include a definition of those proceedings in article 2 should be considered after the Working Group had examined article 11 (see below, para. 147).

35. With reference to the words in square brackets in subparagraph (a), it was noted that the Working Group had not yet decided whether consumer insolvencies should be excluded from the Model Provisions. It was also noted that, at its nineteenth session, the Working Group had agreed to delete the definition of "debtor" (A/CN.9/422, para. 45), a provision that might be a suitable place for exclusion of insolvent consumers.

36. As a matter of structure, it was suggested that, if consumer insolvencies were to be excluded, the definition of foreign proceedings was not the appropriate place for such an exclusion. As for the substance of the provision, different views were expressed as to the desirability of excluding consumer insolvencies from the field of application of the Model Provisions. According to one view, they should be excluded since issues of consumer protection might reduce the willingness of States to enact the Model Provisions. Besides, in the absence of an explicit exclusion, the courts of those States that did not provide consumer insolvencies might exclude them by invoking the public policy exception, which might lead to excessive use, and an excessively broad interpretation, of the public policy exception. According to another view, consumer insolvencies should not be excluded since consumer insolvencies existed in a number of other jurisdictions.

37. After considering the various views expressed on topic, the Working Group considered that it would not be appropriate to exclude consumer insolvencies in subparagraph (a). The Working Group decided to delete the words in square brackets and to consider the issue of consumer insolvencies within the context of recognition of foreign insolvencies under article 11.

Subparagraphs (a) and (b)

38. With regard to subparagraphs (a) and (b), it was observed that the definitions did not expressly refer to proceedings that had been commenced on an interim basis or to interim representatives. It was pointed out that in some legal systems there might be situations where a temporary representative would be appointed for a certain period pending a definitive appointment of a representative. It was agreed that subparagraphs (a) and (b) should also cover such temporary situations. The provision was referred to the drafting group (see also below, para. 39).

Subparagraph (c)

39. In respect of the definition of "opening of foreign proceedings", as contained in subparagraph (c), it was stated that in some national laws insolvency proceedings might be commenced by a corporate act from which followed consequences determined by law, and that uncertainties might arise in applying the definition to such situations. In view of the difficulties in formulating a general definition acceptable to different legal systems, it was suggested to delete subparagraph (c) in its entirety. However, it was

generally felt that, despite such difficulties, a definition such as the one contained in subparagraph (c) was needed. It was essential for the Model Provisions to clarify from what moment on an insolvency was capable of being recognized abroad and a foreign representative could be admitted to act in foreign jurisdictions. After considering the different views expressed, the Working Group agreed to amend the definition of "foreign proceedings" to include a reference to provisional proceedings, to retain the square brackets around subparagraph (c) and to defer further consideration until the decision on recognition of "foreign proceedings" (articles 7 and 11) (see also below, paras. 55, 64 and 113).

Subparagraph (d)

40. As regards the definition of "court" contained in subparagraph (d), it was suggested to delete the words "is deemed to" before the word "include", as those words might inadvertently imply that the Model Provisions established a presumption of law. It was also suggested, for clarity purposes, to include the words "the court" before the words "the competent authority". It was pointed out that insolvency or similar proceedings might fall under the competence of an authority other than a court not only in the foreign jurisdiction, but in the enacting State as well. Since the Model Provisions, on a number of instances, mentioned the courts of the enacting State, it was asked whether article 2 should also include a definition of the courts of the enacting State, in addition to the definition of "foreign court". In reply it was observed that the definition of national courts was essentially a matter for national legislation and that it should be left for each enacting State to decide for itself how that might be done.

Subparagraph (e)

41. With reference to subparagraph (e), the view was expressed that a definition of "establishment", as contained therein, was not necessary in the Model Provisions, as such an expression was not commonly used in some legal systems, and appeared only once in article 11(1)(b). Also, the phrase "with human means" was felt to be vague and to lend itself to misunderstandings. However, support was expressed for providing a definition of "establishment" in the Model Provisions, as the notion of "establishment" was central for the distinction between main proceedings and non-main proceedings in article 11. After a brief exchange of views on that subject, the Working Group agreed that, while it would be important to provide a definition of "establishment", that question should be considered in the light of the issues raised by article 11.

Article 3. International obligations of the enacting State

42. The text of the draft article as considered by the Working Group was as follows:

> "To the extent that this Law conflicts with an obligation of the enacting State under or arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail; but in all other respects the provisions of this Law apply".

43. The Working Group decided to delete the phrase "but in all other respects the provisions of this Law apply" as unnecessary.

Article 4. Competent [court] [authority] for recognition of foreign proceedings

44. The draft article as considered by the Working Group was as follows:

> "The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by ... [Each State enacting these Model Provisions specifies the court, courts or authority competent to perform the functions in the enacting State]".

45. It was observed that competence for the various judicial functions dealt with in the Model Provisions (providing recognition and interim relief, and cooperation with foreign courts) might lie with different courts in the enacting State. One suggestion was to spell that out in greater detail in article 4. The Working Group, however, was of the view that article 4 should not suggest how the enacting State might describe the allocation of jurisdiction. It was suggested that the guide to enactment was a more appropriate place in which to address detailed aspects of the questions raised by article 4. The drafting group was requested to prepare a draft in line with the view of the Working Group. Since the article might cover competence beyond that for recognition, the Working Group decided to change the title to "Competent [court] [authority]".

Article 5. Authorization to act as a foreign representative

46. The text of the draft article as considered by the Working Group read as follows:

> "A [... *insert title of person or body that may be appointed to administer a liquidation or reorganization under the law of the enacting State*] is authorized to seek foreign recognition of the proceeding in which the person or body has been appointed and to exercise such powers as to the foreign assets or affairs of the debtor as the applicable foreign law may permit".

47. It was noted that the authorization embodied in article 5 covered not only an application for recognition but also requests for provisional measures (such as those covered by article 12) and for various forms of cooperation (such as those covered by article 15). While some support was expressed for the view that the current text (in particular the words "exercise such powers ... as the applicable foreign law may permit") adequately covered those instances, the prevailing view was that the text should express only the principle that the insolvency administrator is authorized to act in a foreign State without enumerating the types of measures or relief the administrator might be seeking.

48. It was observed that the draft Model Provisions themselves might limit the authorization of the person or body covered by article 5; namely, article 16 restricted the powers that might be exercised abroad by a representative of a non-main proceeding. It was suggested that such limits should be reflected in article 5. The Working Group, however, considered that the purpose of article 5 was not to

specify the details of the authority of an insolvency administrator but to lay down the principle of the administrator's authority to act abroad.

49. The drafting group was requested to prepare a text reflecting the view of the Working Group.

CHAPTER II. ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO COURTS

Article 6 [12]. Access of foreign representatives to courts

50. The text of draft article 6, as considered by the Working Group, read as follows:

"A foreign representative may

"(a) at any time, directly apply for provisional relief in [any appropriate court of the enacting State];

"(b) directly apply for recognition of a foreign proceeding, request relief pursuant to article 12, and seek cooperation in accordance with article 15;

"(c) [upon recognition,] intervene in collective or any other proceedings in the enacting State affecting the debtor or its assets."

General remarks

51. It was noted that the main purpose of article 6 was to allow direct access by the foreign representative to the appropriate courts of the enacting State, thus bypassing diplomatic or consular channels that might normally be used for judicial assistance purposes. That faculty was of crucial importance for effective judicial cooperation in cross-border insolvencies. The view was expressed, in that connection, that it would be sufficient for article 6 to reflect that principle generally and that subparagraphs (a), (b) and (c) were not needed in article 6, since those subparagraphs envisaged specific actions dealt with elsewhere in the text. The Working Group considered the proposal useful and requested the drafting group to implement it. Meanwhile, the Working Group proceeded to examine the individual subparagraphs of article 6.

52. It was suggested that, with a view to ensuring adequate cooperation in cases involving main and non-main proceedings, the powers referred to in article 6 should be limited to the representative appointed in the main proceedings. The Working Group decided to revert to that question within the context of article 11 (see below, paras. 104 and 147-155).

Subparagraph (a)

53. The view was expressed that, as currently worded, that provision was excessively broad and might give rise to misuse. It was suggested that subparagraph (a) should identify the circumstances that would justify an application by a foreign representative for provisional relief. A question in that regard was whether a request for provisional measures should be linked to an application for recognition, or whether, as subparagraph (a) implied, such a request might be allowed under the Model Provisions even prior to an application for recognition. The widely held view was that it would not be desirable for the Model Provisions to provide for provisional measures to the foreign representative without reference to an application for recognition.

54. At the same time the Working Group affirmed that the Model Provisions should provide the opportunity to request provisional measures once an application for recognition had been filed, though before the granting of recognition. It was suggested that such a link should be required, for example by adding words such as "pending recognition of the foreign insolvency proceedings" or "in view of a future application for recognition". As provided in the draft Model Provisions, provisional relief was not automatically granted, and the foreign representative was only given the right to apply to the court for provisional relief. It was suggested that existing provisions on proof, such as current article 7, could be expanded to provide that the foreign representative should submit proof of his or her status when applying for provisional relief or other measures. However, it was said that provisional relief under emergency circumstances would be rendered nearly impossible if the Model Provisions were to require prior recognition of the foreign insolvency or submit it to more stringent requirements than already provided in the text (see also below, paras. 110-112).

55. The question was asked whether subparagraph (a) was also intended to allow a foreign representative acting under an interim appointment to apply for provisional relief pending a final appointment of a representative in the foreign proceedings. It was explained that a court might appoint an interim representative prior to the final decision that opened the insolvency proceedings. Such a step might be taken in particular because of an urgent need to gather assets, including by way of obtaining provisional measures from foreign courts. It was pointed out that such appointments were under judicial supervision and constituted essential elements of insolvency proceedings in various States. It was also mentioned that, in some jurisdictions, insolvency proceedings might be commenced under statutory authority by non-judicial decisions, such as a corporate act to which the law attached certain consequences. The view was expressed that questions might arise as to whether an interim representative appointed in such non-judicially commenced proceedings might have the right to apply for provisional measures under subparagraph (a). It was observed, however, that although the nature of insolvency proceedings might vary in many jurisdictions, for the purposes of the Model Provisions it was sufficient that the foreign representative had been appointed under "foreign proceedings", as defined in article 2(a) (see also above, para. 38).

56. After consideration of the views expressed, it was agreed that detailed provisions on provisional relief, including provisional relief sought by interim representatives did not belong in article 6 and should be dealt with in the context of article 12.

Subparagraph (b)

57. As regards subparagraph (b), it was agreed that, if provisions were retained, reference should be made therein to the court referred to in article 4, since that would be the only court competent for the recognition of the foreign proceedings.

Subparagraph (c)

58. With regard to the foreign representative's right to intervene in collective or any other proceedings in the enacting State, it was felt that such a right was closely related to the right of the foreign representative to request the opening of insolvency proceedings in the enacting State and should, therefore, be covered by article 9.

Article 7 [13]. Proof concerning foreign proceeding

59. The text of the article as considered by the Working Group was as follows:

"(1) A petition for recognition of a foreign proceeding [, or a petition for provisional measures [filed prior to an application for recognition,]] shall be submitted to the court accompanied by proof of the opening of the proceedings and of the appointment of the foreign representative. Such proof may be in the form of:

"(a) a certified copy of the decision or decisions opening the foreign proceeding and appointing the foreign representative;

"(b) a certificate from the foreign court evidencing the opening of the foreign proceeding and appointing the foreign representative; [or

"(c) in the absence of such form of proof, in any other manner required by the court].

"No legalization of documents referred to in paragraph (1) or other similar formality is required.

"(2) A translation of the documents referred to in paragraph (1) into an official language of the enacting State may be required."

General remarks

60. It was noted that the proof referred to in article 7 was required for the purposes of the application for recognition or provisional measures under article 12. Therefore, it was suggested that it would be more appropriate to regulate that matter within the context of article 11, which dealt with recognition, rather than as a separate provision. The Working Group requested the drafting group to consider implementing that suggestion. Meanwhile, it proceeded with its review of article 7.

Paragraph (1)

61. With regard to the proof referred to in subparagraphs (a) and (b), the view was expressed that, in emergency situations, an interim or only recently appointed representative might not be in a position to produce the documentation required by article 7. In response, it was pointed out that subparagraph (c) provided the opportunity for the court to request alternative forms of proof in the event that the proof referred to in subparagraphs (a) or (b) was unavailable.

62. The question was raised whether it was reasonable to waive the requirement of legalization of foreign court decisions. In response, it was recalled that the nineteenth session of the Working Group had affirmed that the negation of "legalization" requirements was meant to avoid time-consuming notarial or consular procedures ill-suited for dealing with cross-border insolvency cases, because they lacked the required element of speedy treatment of applications by foreign representatives.

63. Furthermore, it was noted that, in practice, courts would require, if necessary, some explanation of the validity and effects of foreign proceedings, particularly from jurisdictions with which they had had no dealings in the past. Article 7 had to be understood in the light of its basic aim, which was to establish a presumptive threshold. The prevailing view in the Working Group was that the amount of information required in article 7 was sufficient for a court to establish whether foreign proceedings within the meaning of article 2 existed and whether a foreign representative had been appointed. The purpose of article 7 would be defeated if that provision would allow a court to establish more stringent requirements than already provided therein.

64. With regard to the requirement for a certified copy of "the decision" opening the foreign proceeding, the concern was expressed that the use of such an expression might exclude those cases in which the foreign representative was appointed, or the proceedings were commenced, without an actual "decision" or "order" of the court (e.g., by right pursuant to statutory authority, such as in a debtor-initiated voluntary proceeding). It was suggested that the Working Group should consider using alternative language or omitting those references altogether. It was also noted that the provision of article 7(1)(b) on the use of a certificate from the foreign court for purposes of proof would be available in the case of such proceedings. It was further suggested that the provision be redrafted so as to cover interim representatives. The Working Group reiterated its view that, in any event, for the purposes of the Model Provisions it was essential that the foreign representative had been appointed under a "foreign proceeding", as defined in article 2(a) (see also above, para. 38).

65. The suggestion was also made that, in order to enable the court in the enacting State before which a petition or petitions for recognition were pending to determine which proceeding was the main proceeding, the foreign representatives should be required to indicate the nature and jurisdictional basis of the foreign proceeding.

Paragraph (2)

66. In respect of the provision in paragraph (2), it was pointed out that in some cases the court might have difficulties in obtaining translation of the documents into an official language of the State and that, under such circumstances, the court might consider it acceptable that the documents be translated into another language understandable to the court. It was also mentioned that, in the case of States with more than one official language, the court might require that all documents be translated into one particular language. One possible way of expressing that, it was said, was to refer to the "official language of the court".

67. Subject to the views expressed on the provision, the Working Group found the substance of article 7 to be generally acceptable and referred it to the drafting group.

Article 8 [14]. Limited appearance

68. The text as considered by the Working Group was as follows:

> "An appearance before a court in the enacting State by a foreign representative in connection with a petition or request pursuant to the provisions of this Law does not subject the foreign representative to the jurisdiction of the courts of the enacting State for any other purpose [related to assets and affairs of the debtor]."

69. The Working Group reiterated the position taken at its previous session that the provision was a useful "safe conduct" rule aimed at ensuring that the court in the enacting State should not assume jurisdiction over the entire debtor's assets on the sole ground of the foreign representative having made an application for recognition of a foreign proceeding (A/CN.9/422, para. 161). It was said that assuming jurisdiction where there was no ground for it other than the request for recognition would unduly interfere with the actions of foreign representatives in favour of debtor's assets and might deter them from taking those actions.

70. The Working Group requested the drafting group to prepare a text that would more clearly reflect its understanding and that would not use the term "appearance", which was used as a technical term in some jurisdictions.

Article 9 [16]. Commencement of insolvency proceedings by foreign representative

71. The text as considered by the Working Group read as follows:

> "A foreign representative is entitled to request the opening of insolvency proceedings in the enacting State if the conditions for opening such a proceeding under the laws of the enacting State are met. Any such request shall be accompanied by the proof of the [opening of] the foreign proceeding and the appointment of the foreign representative referred to in article 7(1)."

72. The question was asked whether article 9 was needed as a separate provision, since article 6 already provided for the foreign representative's right of direct access to the courts of the enacting State. In response, it was observed that article 9 contained a substantive rule with a broader scope than the right of direct access under article 6. The purpose of article 9 was to provide the foreign representative with an independent right to request the opening of insolvency proceedings in respect of the debtor, in addition to the creditors' right to request the opening of such proceedings. The Working Group agreed that a rule such as the one contained in article 9 was needed and that it should be stated in a separate provision.

73. It was asked whether the foreign representative was also empowered to request the opening of insolvency proceedings in respect of subsidiary companies of the debtor in the enacting State. In response it was observed that the foreign representative's right to request the opening of insolvency proceedings in respect of the debtor did not encompass a right to request the opening of insolvency proceedings in respect of subsidiary companies with a juridical personality of their own, except where such possibility was provided under the laws of the enacting State.

74. Various interventions were made in favour of limiting the right to request the opening of foreign non-main proceedings to the representative in the main proceedings. It was said that the administration of the main proceedings might be jeopardized if representatives in non-main proceedings were empowered to request the opening of other non-main proceedings. Also, such a possibility might adversely affect the coordination of concurrent proceedings and add complexity to the already difficult task of securing control over the debtor's assets in cross-border insolvencies. However, the Working Group noted that that question was closely linked with the matters dealt with in article 16 and decided to revert to it after consideration of article 16.

75. The Working Group considered that the second sentence of article 9, which dealt with the proof to be submitted by the foreign representative for the purpose of requesting the opening of insolvency proceedings under article 9 was not necessary, since that matter was dealt with in article 7.

Article 10 [17]. Access of foreign creditors to insolvency proceedings in the enacting State

76. The text as considered by the Working Group was as follows:

"(1) Any creditor not resident, domiciled or with a registered office in the enacting State, has the right to commence and file claims in insolvency proceedings in the enacting State, to the same extent and in the same manner as other creditors [of the same priority] who are resident, domiciled or have a registered office in the enacting State, in accordance with the procedural requirements of the enacting State. [Claims under public law such as foreign tax and social security claims, [shall][may] be treated as general (non-priority or non preference) claims.]

"(2) As soon as insolvency proceedings are opened in the enacting State, and to the extent that notification of commencement of insolvency proceedings is required for creditors in the enacting State, the [court][administrator] shall cause notification of the opening of the proceedings to be

made also to creditors not resident, domiciled or with a registered office in the enacting State. The notification shall provide [a reasonable minimum time] within which such a creditor can file a claim.

"(3) The contents of the notification shall include:

"(a) an indication of the time limits and the place for filing of claims, and the sanctions that result from failure to comply with those requirements;

"(b) an indication whether secured creditors need to file their secured claims; and

"(c) any other information required to be included in notifications to creditors pursuant to the laws of the enacting State and the orders of the court."

Paragraph (1)

77. The Working Group recalled the intent of paragraph (1) which was to establish a non-discrimination rule on treatment of foreign creditors in the enacting State. Two main questions in the discussion were whether the rule of non-discrimination required that foreign creditors be admitted in the same or equivalent class of priority as local creditors and whether paragraph (1) should venture into the question of recognition of claims of foreign tax and social security authorities.

78. The question was asked whether the rule of non-discrimination in paragraph (1) concerned only the right to request the opening of the insolvency proceedings or encompassed the treatment to be afforded to foreign creditors as well. In response it was said that the use of the words "to the same extent and in the same manner" were intended to clarify that paragraph (1) also required equal treatment of foreign creditors in all other respects. However, it was observed that paragraph (1), in its current form, did not give adequate prominence to the principle of non-discrimination, and it was generally felt that it would be desirable to address that principle in a separate paragraph, and to deal separately with the various categories of creditors and claims mentioned therein.

Treatment of foreign creditors

79. With respect to the question of establishing equal treatment between foreign and local creditors "of the same priority", it was noted that definitions and classes of priority of creditors varied greatly from country to country and that it would not be feasible to require that the court of the enacting State should apply to foreign creditors the priority rules of their respective foreign laws. The view was expressed that, since the rule of non-discrimination should be understood as a rule of national treatment, it would be preferable to leave it for the court of the enacting State to determine, on the basis of the national law, what priority, if any, was to be given to foreign creditors.

80. According to another view, it was important to provide a minimum standard for the treatment of foreign claims. It was said that the rule of non-discrimination would be meaningless if, in the absence of such a minimum standard, the court of the enacting State remained free to exclude all foreign claims. It

was thus suggested that article 10 should provide that claims of foreign creditors had at least to be treated in the same manner as local non-priority claims.

81. After consideration of the different views expressed, the Working Group agreed that article 10 should provide alternative options to enacting States concerning the treatment of foreign creditors. The drafting group was requested to formulate provisions to that effect.

Foreign tax and social security claims

82. As regards the question of foreign tax and social security claims, it was observed that including reference to those claims might elicit objections to the Model Provisions in those States that traditionally did not accord to foreign tax and other authorities status equal to that accorded to local tax and other fiscal authorities. It was suggested that venturing into that area would diminish acceptability of the Model Provisions and that the last sentence in square brackets should be deleted. However, the view was also expressed that that sentence could be retained to indicate that admitting claims by foreign tax and social security was an option offered to States. The retention of the words in square brackets could serve the purpose of indicating that foreign tax and social security claims were not subsumed in the general reference to "foreign creditors" made earlier in paragraph (1). If the sentence in square brackets were to be deleted, the guide to enactment should clarify that such deletion had not been intended to exclude those claims from the ambit of paragraph (1).

83. In view of the possible different approaches that enacting States might wish to take in respect of foreign tax and social security claims, the Working Group found it preferable to offer options to States reflecting the two positions expressed in the Working Group. That matter, too, was referred to the drafting group.

Other issues raised by paragraph (1)

84. The phrase "to commence [...] insolvency proceedings in the enacting State" was found to be inadequate, as in many legal systems the insolvency proceedings were only commenced by judicial decision. It was agreed that paragraph (1), similarly to article 9, should instead refer to the right to "request the opening" of the insolvency proceedings.

85. The question was raised as to whether it would be advisable, in case of non-main proceedings, to limit the right to request the opening of insolvency proceedings to the local creditors, similarly to the provisions contained in article 3(4) of the European Union Convention on Insolvency Proceedings. It was said that such a rule would ensure greater coordination and avoid situations where creditors entirely unrelated to a secondary establishment would request the commencement of non-main proceedings outside the centre of the debtor's main interests. In response it was noted that, under the European Union Convention, the opening of main proceedings had far-reaching consequences. Such a system required a higher degree of coordination between representatives in main proceedings and non-main proceedings and a more restrictive rule than the one contained in paragraph (1) of the draft Model Provisions. Besides, in examining a request for the opening of non-main proceedings, the court of the

enacting State retained the prerogative to decline to exercise jurisdiction, if the creditor lacked sufficient connection with the enacting State.

Paragraph (2)

86. It was noted that paragraph (2) imposed on the court or the administrator, as the case might be, an obligation to inform foreign creditors of the existence of insolvency proceedings, so as to give them the opportunity to file their claims or take other measures to protect their rights. As currently worded, paragraph (2) seemed to require such notice in every case or to provide a right to notice exclusively to foreign creditors. However, paragraph (2) had to be read in conjunction with the non-discrimination rule stated in paragraph (1). The underlying idea was that notice to foreign creditors was required when such notice would have to be given to local creditors. The Working Group considered that the purpose of paragraph (2) could be clarified by providing that foreign creditors had to be notified of the commencement of insolvency proceedings in cases in which the law of the enacting State required such notice to be given to local creditors. Since the moment when such notice had to be given varied in different legal systems (e.g., at the outset of the insolvency proceedings or at a later stage), and since at the time of opening of the proceeding the identity of foreign creditors might not yet be known, the Working Group agreed to delete the words "as soon as" in paragraph (2).

87. It was noted that, at its nineteenth session, the Working Group had based its considerations on the assumption that notification was mandatorily to be given to known creditors only, and it was suggested that appropriate reference to that effect be made in paragraph (2). In that connection, the question was asked how the court of the enacting State would identify all foreign creditors for the purpose of issuing the notification. In reply, it was observed that, for example, the names and addresses of foreign creditors would be obtainable from the debtor's books and correspondence and that in the case of debtor-initiated insolvencies, national laws often required the debtor to produce a full list of creditors.

88. The Working Group considered at length the question of the form of the notification to be given to foreign creditors. It was noted that national laws provided different procedures for notifying creditors in insolvency proceedings: in some cases all notifications were made by publication in the official gazette or in local papers; in other cases the notification was made individually, by mail or through a court clerk; other procedures included affixing notices within the court premises. Sometimes the law provided for a combination of any such procedures, according to the purpose of the notification.

89. The view was expressed that paragraph (2) should be subject to national law, or that the choice of the form of notification should be left to the discretion of the court of the enacting State. According to that view, providing for a special form of notification for foreign creditors would run counter to the principle of national treatment enshrined in paragraph (1) and would impose excessive burden and costs, which would have to be met by the proceedings. Where the notification requirements were met, for instance by publication, such a method should suffice for notifying foreign creditors.

90. However, it was observed that foreign creditors, by not having direct access to local publications of limited circulation, found themselves in a less advantageous situation than local creditors. In the circumstances, it was reasonable to require special notification for foreign creditors, so as to ensure that

all creditors, both local and foreign, had equal opportunity for filing their claims in the insolvency proceedings. It was suggested that the Model Provisions should, as a general rule, require individual notification of foreign creditors. In the event, however, that such notification would entail excessive costs for the proceedings, or would not seem feasible under the circumstances, the court of the enacting State could, as an exception, be given the discretion to choose another appropriate form of notification, or to dispense with such notification.

91. Several interventions were made in favour of the latter proposition, which was considered to be an equitable solution for providing an effective method of notification for foreign creditors, while giving the court of the enacting State sufficient latitude for adopting other methods of notification, when the circumstances of a given case did not warrant individual notification. The Working Group considered that, for purposes of clarity, a provision to that effect should be included, perhaps in a separate article, and referred the matter to the drafting group, or to dispense with such notification.

92. The Working Group also considered various suggestions regarding the language in which such notification was to be issued. Those suggestions included the following: that the notification be issued in more than one language, including one or more of the official languages of the United Nations; that the notification contain a statement of its purposes in all official languages of the United Nations (e.g.: "Notification of insolvency proceedings - File your claim within ___ days."), or that the notification be issued in a standard form to be annexed to the Model Provisions. While agreeing in principle on the desirability that foreign creditors be notified in a language accessible to them, the Working Group felt that not all enacting States might be in a position to introduce such a requirement. It was noted, in that connection, that it would be in the foreign creditor's own interest to obtain a translation of the notification and that in most cases a diligent creditor would do so. It was suggested that a model form or forms of such notifications should be included in the guide to enactment.

93. As to the question of the time-limit within which foreign creditors could file a claim, the Working Group, while considering that such time-limit had to be reasonable, agreed that such question should be dealt with within the context of paragraph (3). It was thus agreed that the last sentence of paragraph (2) should be deleted (see below, para. 96).

Paragraph (3)

94. As a general remark, it was pointed out that certain States had undertaken specific obligations, under regional agreements on judicial cooperation, to effect notifications in a special manner. The view was expressed that those States might have difficulties in implementing paragraph (3) in any manner not consistent with their existing requirements. The Working Group took note of those remarks.

95. The view was expressed that subparagraphs (a) and (b) were not necessary, since most jurisdictions would normally require that the information referred to therein be provided to creditors. However, the prevailing view was that subparagraphs (a) and (b) contained minimum requirements and that, for the purpose of ensuring uniformity in the application of the Model Provisions, it was useful to retain those two subparagraphs.

96. The Working Group discussed the question of the time-limit within which foreign creditors could file their claims. It was felt that it would be equitable to afford foreign creditors an extended time-limit to file their claims, as was the case in a number of jurisdictions. However, as it would not be realistic to provide a single time-limit for all jurisdictions, it was agreed to require that foreign creditors be given a reasonable time-limit.

97. With regard to subparagraph (a), the Working Group decided to delete the reference to the sanctions that might result from the failure by the foreign creditor to observe the filing requirements, since that reference might create uncertainties as to the level and type of information required.

98. The Working Group requested the drafting group to prepare a revised version of the article reflecting the discussion that had taken place.

CHAPTER III. RECOGNITION OF FOREIGN INSOLVENCY PROCEEDINGS

Article 11[6]. Recognition of foreign insolvency proceedings

99. The draft article as considered by the Working Group was as follows:

"(1) For the purposes of this Law, a foreign proceeding shall be recognized:

"(a) as a foreign main proceeding if the court of the foreign proceeding has jurisdiction based on the centre of the debtor's main interests;

"or

"(b) as a foreign non-main proceeding if the debtor has an establishment [within the meaning of article 2((e)] in the foreign jurisdiction.

"(2) The court shall grant or refuse an application for recognition of a foreign main proceeding within ____ days after the application has been filed with the court.

"(3) Absent proof to the contrary, the registered seat of the debtor is deemed to be the centre of its main interests."

100. A view was expressed that it was unnecessary to introduce in the Model Provisions the notion of "recognition" of foreign insolvency proceedings; it was said that according to the draft Model Provisions the purpose of having a foreign proceeding recognized was to obtain relief as dealt with in article 12 and that it would be possible to make granting such relief subject to the same safeguards as they currently appeared in article 11 without a special procedure for "recognition". The Working Group, however, was of the view that recognition was a useful concept since it clarified the nature of the

decision-making process leading to relief as dealt with in article 12 and since recognition would have other consequences foreseen in the draft Model Provisions (in particular in the context of concurrent proceedings under article 16).

101. The Working Group agreed that the article should more clearly express that recognition was not automatic, that it was given upon request of the foreign representative, and that recognition could only be granted if proof specified in article 7 had been presented. There was general agreement that, in expressing those elements, it was necessary to make it clear that the court seized with a request for recognition of a foreign proceeding should not reconsider the grounds on which the foreign court decided to open that foreign proceeding.

102. It was observed that the term "recognition" was a technical term used for giving effect to foreign judicial decisions, that under the draft Model Provisions "recognition" meant only recognition of foreign proceedings, and that in the European Union Convention on Insolvency Proceedings the effects of recognition of foreign proceedings were much broader than in the draft Model Provisions. In order to avoid possible confusion about the effects of recognition under the draft Model Provisions and in order to show more clearly that those effects under the draft Model Provisions differed from the effects of recognition under the European Union Convention, it was suggested to replace the word "recognition" by another expression. The drafting group was requested to consider that matter.

103. It was recalled that the Working Group had discussed how the Model Provisions should deal with insolvencies involving specially regulated financial services institutions such as banks, insurance companies, and collective investment entities. It was said that States might wish to take into account special circumstances possibly raised when the foreign debtor was such an institution. It was suggested that article 11 might be an appropriate place to reflect such special considerations by including among the grounds for refusal of recognition of a foreign proceeding the fact that the foreign debtor was a financial institution regulated under the law of the enacting State.

104. It was suggested that recognition should be restricted to foreign main proceedings and that the effects of foreign non-main proceedings should be restricted to providing a more limited relief and to providing assistance and cooperation as dealt with in article 15. The Working Group, recalling its considerations of the issue at its previous session (A/CN.9/422, paras. 82-83, 101 and 103), decided to revert to the issue in the context of article 12 (see below, paras. 147-155).

Article 12 [7]. Relief available to foreign representatives

105. The text of draft article 12, as considered by the Working Group, read as follows:

> "(1) (a) From the time of the filing of an application for recognition until recognition has been granted or refused, and where necessary to protect the assets of the debtor or the interests of creditors, the court may, upon the request of the foreign representative, grant any of the [types of] relief permitted under paragraph (2); [such relief shall be available upon application in the case of a foreign main proceeding in one of the States listed in Annex X];

"(b) The court shall order the foreign representative to give such notice as would be required for requests for provisional relief in the enacting State;

"(c) Such relief may not extend beyond the date that recognition is granted or denied, unless extended under paragraph (2)(b)(ii).

"(2) (a) Upon recognition of a foreign main proceeding[, or upon application for recognition in regard to proceedings taking place in one of the States listed in Annex X,] the commencement or continuation of individual actions by creditors against [the debtor or] [the debtor's assets] and the transfer of any assets of the debtor are stayed. The stay is subject to any exceptions or limitations which would apply under

"OPTION I: any law of the enacting State which would apply to proceedings determined by the court to be comparable to the foreign main proceeding;

"OPTION II: the law of the foreign main proceeding [if the foreign main proceeding is taking place in one of the States listed in Annex X];

"(b) Upon recognition of any foreign proceeding, the court may, upon the request of the foreign representative, grant any appropriate relief including:

"(i) staying actions that are not stayed or extending the stay of action under paragraph (2) (a);

"(ii) extending relief granted under paragraph (1) to protect the assets of the debtor or interests of creditors;

"(iii) compelling testimony or the delivery of information concerning the assets and liabilities of the debtor;

"(iv) permitting the foreign representative to preserve and manage the assets of the debtor;

"(v) granting other relief which may be available under the laws of the State of the foreign proceeding or under the laws of the enacting State, including actions to reverse or render unenforceable legal acts detrimental to all creditors;

"(c) The foreign representative shall give notice of recognition, of the stay under paragraph (2)(a), and of any relief granted under paragraph (2)(b), within ___ days to all known creditors that have an address in the enacting State;

"(d) Any relief under this paragraph shall terminate,

"(i) unless extended prior to such termination, within ___ days after recognition; or

"(ii) if insolvency proceedings under the law of the enacting State have been commenced and to the extent that the court in such proceedings orders the termination of such relief.

"(3) Upon request of the foreign representative in a foreign main proceeding, the court may, no earlier than ___ days after recognition, grant turnover of assets to the foreign representative for administration, realization or distribution in the foreign proceeding.

"(4) In granting or denying relief under this article, the court must be satisfied that creditors collectively are protected against prejudice and will be given a fair opportunity to assert their claims against the debtor.

"(5) The court may at any time, upon request of a person or entity affected by relief granted or requested under this article, deny, modify or terminate such relief.

"(6) A court granting relief to the foreign representative may condition such relief on compliance by the foreign representative with the orders of the court."

General remarks

106. It was noted that, under the approach developed at the previous session, certain "minimum" effects would result more or less automatically from recognition. Those included in particular: a stay of individual creditor actions and of transfers by the debtor of interests in assets, and the possibility for the foreign representative to seek from the court additional relief appropriate in the circumstances.

107. The view was expressed that article 12 was excessively long and that the Working Group should attempt to reformulate it more concisely. Furthermore, article 12 dealt with a number of topics which, while interrelated, did not necessarily have to be all addressed in the same article. The understanding of article 12 might be improved if it were divided into an appropriate number of separate articles.

108. Questions were raised as to whether the relief provided in article 12 was of a permanent or a temporary nature. In reply it was observed that the different forms of relief provided in article 12 constituted essentially temporary measures and that the court of the enacting State had the authority to determine their duration in each case, as appropriate in the circumstances.

109. It was pointed out that article 12 did not establish any time-limit for the court of the enacting State to act upon the application for recognition following a decision granting provisional relief. It was suggested that a time-limit might be useful with a view to avoiding or mitigating the potential damage to creditors or other interested parties that might result from relief measures that extended over an unreasonably long period due to delay by the court in acting upon the application for recognition. In response it was observed that, while the spirit of article 12 required expeditious consideration by the court of the enacting State of the application for recognition of the foreign proceedings, the question raised was not suitable for being addressed within the limited scope of the Model Provisions and should be left for the laws of the enacting State.

Paragraph (1)

110. The Working Group considered the question whether the foreign representative's right to apply for provisional relief had necessarily to be linked to an application for the recognition of the foreign proceedings. According to one view, the purpose of giving the foreign representative the right to apply for provisional relief was to empower the foreign representative to take measures urgently needed for the protection of the assets of the debtor. In some cases those measures might be needed even prior to the filing of an application for recognition. The Model Provisions could require that the application be filed within a specified time-limit from the date of request for provisional relief.

111. According to another view, the requirement of an application for recognition could not be dispensed with, since it was only the recognition that established definitely the status of the foreign representative in the enacting State. Paragraph (1) had already taken into account the possibility of an urgent need for provisional relief by authorizing the granting of provisional relief prior to final recognition. Besides, authorizing provisional relief prior to, or in anticipation of, an application for recognition, would render article 12 overly complex, as it would require that the Model Provisions specify the circumstances and conditions (such as a security deposit by the foreign representative or other conditions currently provided in some national laws) under which such relief might be granted.

112. After discussing the various views expressed, the Working Group agreed to retain the link between provisional relief and the application for recognition of the foreign proceedings, as reflected in paragraph (1). It was felt that the relative unlikelihood that a foreign representative might not be able to apply for recognition simultaneously with a request for provisional relief did not warrant venturing into that question, which should be left for the laws of the enacting State.

113. Various interventions were made concerning the possibility of an interim representative applying for provisional relief. The Working Group noted that the question of interim representatives had already been raised in connection with a number of other provisions and that the drafting group had been requested to draft a separate set of provisions dealing with the status of interim representatives for later consideration by the Working Group. Once the Working Group had agreed on those provisions, an interim representative meeting the requirements might be regarded as a duly appointed foreign representative for all purposes of the Model Provisions, including article 12. Subsequently, the Working Group considered a draft provision dealing with interim representatives and decided that, with appropriate safeguards concerning a duty by the interim representative to notify the court of the conditions of his or her appointment, and with a modification of the definitions in article 2 to include reference to interim representatives and to proceedings commenced on an interim basis, no separate provision was necessary. (See also above, para. 38).

114. The question was asked whether the rights given to the foreign representative under paragraph (1) also extended to local or foreign creditors. In response it was observed that foreign creditors were given the right to initiate insolvency proceedings under article 10, and that local creditors might have other rights under local law, which was consistent with the draft Model Provisions. The purpose of article 12

was to give certain powers to the foreign representative as the representative of the collectivity of creditors and did not deal with the rights of creditors to obtain provisional relief.

Paragraph 2 (a)

115. In the previous sessions of the Working Group there had been agreement on the importance of the provisions contained in paragraph (2)(a), without which the preservation of the assets of the debtor could not be assured. However, the definition of the scope of the stay and possible exceptions or limitations remained to be considered.

116. It was noted that the main purpose of the stay of individual actions was to prevent the debtor's assets from being dispersed through enforcement measures ordered in individual actions. While there was general support for the need to stay all individual actions that could lead to such a situation, different views were expressed as to how the scope of the stay in paragraph (2)(a) should be defined.

117. Reservations were expressed against the use of the words "actions against the debtor's assets", which in some legal systems would not be technically acceptable, as a judicial action had to be brought against a person. Instead, it was suggested to use the expression "actions concerning the debtor's assets" or other similar expressions.

118. Also, questions were asked about the meaning of the words "actions against the debtor". Since the Working Group had agreed that the draft Model Provisions should also cover insolvencies of individuals, the concern was expressed that, without qualification, the words "actions against the debtor" might include types of actions that some legal systems excluded from the stay of actions in insolvency proceedings, such as actions concerning civil status, alimony, and various administrative and criminal procedures. In response it was noted that questions of exceptions and limitations were left to be decided under the laws of the enacting State, or the laws of the foreign main proceedings, as currently provided in the two options in paragraph (2)(a).

119. It was suggested that paragraph (2)(a) should not be limited to judicial measures, as seemed to be implied by the use of the word "actions", and that it was important to encompass also non-judicial enforcement measures by secured creditors, which were authorized in some jurisdictions. The words "or proceedings" should thus be added after the word "actions", and appropriate explanation should be given in the guide to enactment that those proceedings might also include non-judicial measures.

120. Reservations were voiced concerning the use of the words "by creditors" in paragraph (2)(a). It was noted that the stay was meant to cover all actions capable of affecting the assets of the debtor or increasing the debtor's liabilities. However, in some actions the status of creditors might be in dispute or might only be established by final judgement. Also, it might be important to stay actions brought by interested parties who might not be technically regarded as "creditors" at the time of the stay.

121. After considering various proposals for clarifying the purpose of paragraph (2)(a), the Working Group agreed in principle to use the phrase "actions or proceedings concerning the debtor's assets, rights, obligations or liabilities".

122. The view was expressed that a general stay of actions against the debtor was not ordinarily provided in some jurisdictions, and could only be granted under special conditions established by the competent court. In those jurisdictions, the courts might require proof by the foreign representative of an imminent danger to the assets of the debtor that would result from the continuation of individual actions. The view was also expressed that in some other jurisdictions where a stay was available but the requirements under local law were very high, such requirements would need to be observed, so as to avoid double standards for local and foreign representatives in the enacting State. Thus, it was suggested to add the word "requirements" before the word "exceptions" in the second sentence of paragraph (2)(a).

123. In response it was noted that paragraph (2)(a) dealt with automatic effects of the recognition of the foreign insolvency proceedings. Such effects should not be subject to requirements that imposed difficult evidentiary burden on the foreign representative. Besides, sufficient safeguards had been incorporated into paragraphs (4), (5) and (6) to protect the interests of creditors and other interested parties. Thus, the Working Group felt that the word "requirements" should not be added to the second sentence of paragraph (2)(a).

124. With regard to the stay of the transfer of any assets of the debtor, the Working Group recalled its previous discussions on that issue (A/CN.9/422, paras. 108 and 109). During those discussions, suggestions had been made that the mention in paragraph (2)(a) of the stay on transfer of the debtor's assets needed to be made subject to transfers that might be necessitated by the ordinary course of business, such as the payment of salaries to employees. It was suggested that the stay provided in paragraph (2)(a) should not extend to transfers made in the course of ordinary business and should essentially concern acts of an "irregular" nature.

125. It was generally felt, however, that the introduction of the notion of "irregularity" in paragraph (2)(a) might create uncertainty as to the scope of the stay. Also, an attempt to define "regular" transfers (i.e., those made in the course of ordinary business) which would not be affected by the stay might render paragraph (2)(a) excessively complex. A more pragmatic approach would be to leave that matter to be treated as an exception or limitation that might be made to paragraph (2)(a) under the laws of the enacting State or of the State of the foreign main proceedings under the two options provided in paragraph (2)(a), and clarify that the scope of the stay provided therein would be subject to those exceptions and limitations.

126. It was noted that the purpose of the stay of transfer of assets was to preserve the integrity and value of the debtor's assets, and that, therefore, paragraph (2)(a) should cover not only the transfer of title to assets or turnover of assets, as the current text seemed to imply, but should also encompass acts of disposition such as the pledge or encumbrance of assets.

Paragraph 2(b)

127. As a general remark, it was stated that the measures contemplated in paragraph (2)(b) might concern the rights of parties other than the foreign representative and that, therefore, those measures should not be made subject to an application by the foreign representative. It might be useful to

provide that the court could order any of those measures also without such an application. In response it was observed that the draft Model Provisions were concerned with judicial cooperation in cross-border insolvencies and that the purpose of paragraph 2(b) was to empower the foreign representative to request measures that might be required in the enacting State in the interest of the foreign proceedings. Accordingly, paragraph 2(b) did not affect remedies available to other interested persons under local law.

128. Having found the substance of subparagraphs (b)(i), (b)(ii) and (b)(iii) to be acceptable, the Working Group focused its discussions on subparagraphs (b)(iv) and (b)(v).

129. It was noted that some jurisdictions might require special qualification or licensing for the administrators of assets of an insolvent debtor, or might reserve those functions to an official receiver or another official appointed by the court. Courts in those jurisdictions might not be in a position to permit a foreign representative to manage the assets of the debtor. It was agreed that subparagraph (b)(iv) should be worded in a manner that afforded the court the necessary flexibility in appointing a person to preserve, administer and manage the assets of the debtor, including, but not limited to, the foreign representative.

130. It was suggested that the foreign representative's right to intervene in collective or any other proceedings in the enacting State affecting the debtor or its assets, currently contained in article 6(c) should be included among the relief contemplated in paragraph (2)(b). However, it was observed that the foreign representative's right under article 6(c) was a right automatically flowing from the recognition of the foreign proceedings, for which no application to the court was required. Therefore, it would not be appropriate to include the substance of article 6(c) in paragraph (2)(b).

131. It was pointed out that the authority given to the foreign representative under subparagraph (2)(b)(iv) would include all acts which a person appointed by the court to preserve and manage the assets of an insolvent debtor was authorized to perform under the laws of the enacting State, including the right to commence legal proceedings concerning the preservation of the debtor's assets.

132. Various interventions were made with respect to subparagraph (2)(b)(v). One was to delete it since the chapeau of paragraph (2)(b) made it clear that the court of the enacting State retained the authority to grant other relief not specifically listed in paragraph (2)(b). The Working Group, however, considered that the general reference in subparagraph (v) was useful since it emphasized the non-exhaustive nature of the list.

133. As to the possibility mentioned in subparagraph (b)(v) that the court might issue measures pursuant to a foreign law, i.e., the law of the foreign proceeding, it was widely thought that such a possibility was unrealistic and that, therefore, the reference to foreign law should be deleted. Nevertheless, the Working Group considered that it would be useful for the draft Model Provisions to retain that possibility in the form of an option for the enacting State presented outside the text of the provision itself. The Secretariat was requested to prepare a draft for such an optional provision.

134. While agreeing with the principle that a foreign representative should be given the right to commence actions to reverse or render unenforceable legal acts detrimental to creditors (sometimes referred to as "Paulian actions"), the Working Group considered that it would be preferable to delete the reference to them in subparagraph (b)(v). The numerous issues raised by such actions did not lend themselves to simple and harmonized solutions within the limited scope of article 12. The Working Group decided to remove the reference to those actions from (b)(v). However, the Working Group decided to consider, at a later stage, the question whether certain limited aspects concerning those actions could be dealt with in a separate article in the Model Provisions. It was stated that such actions might present the only possible way for a foreign representative to recover assets. It was stated that, in any event, the standing of the foreign representative to commence such actions should be tied to recognition.

Subparagraph (c)

135. The suggestion was made to subject the notice requirements referred to in subparagraph (c) to the discretion of the court; if that was adopted, the duty to give notice could be incorporated into paragraph (6). The Working Group, however, decided that the substance of the provision should be retained, that the duty to give notice should expressly be linked to the law of the enacting State, and that giving such notice would not delay the effectiveness of the relief.

Subparagraph (d)

136. As to subparagraph (i), it was said that some measures under paragraph (2) might, at the time of their issuance, be meant to be in force for a period beyond the moment when recognition was granted (such measures might be, for example, a stay of actions or suspension of transfers of assets); on the other hand, the court could also issue measures designed to terminate at a point of time that had no connection with the time of issuance of the decision granting recognition. Therefore, it was considered that the moment of recognition was not a suitable reference for terminating relief. Proposals were made for the deletion of the provision, with which the Working Group agreed.

137. As to subparagraph (ii), it was suggested that the opening of insolvency proceedings in the enacting State should automatically terminate relief granted to the foreign representative, without subjecting the termination to the order of the court. The opposing view was that a provision on the automatic termination of relief would enable debtors to free themselves from restraints such as those mentioned in paragraph (2) by requesting the opening of local insolvency proceedings. It was therefore useful to leave to the court a degree of control over the termination of relief. The Working Group, however, thought that the Model Provisions should not deal with the issue and decided to delete the subparagraph. It was observed that, as a consequence of the deletion, the question of termination of relief upon the opening of local proceedings was left to the law outside the Model Provisions. In that connection it was observed that, if relief had been granted by a court different from the court that opened the local insolvency proceedings, the decisions of the two courts might interfere between themselves. A suggestion was made that a provision resolving such potential interference was desirable, with which, however, the Working Group did not agree.

Paragraph (3)

138. It was observed that the debtor's assets were often not physically turned over to the foreign representative; instead, the debtor was divested of its assets, and it was the administration of the assets that was entrusted to the foreign representative. It was therefore suggested that a term other than "turnover" should be used.

139. Several suggestions were made to the effect that the discretion to permit the foreign representative to administer, realize or distribute debtor's assets should be restricted. In particular, it was necessary to make sure that any local insolvency proceedings were concluded and that, if local proceedings had not been initiated, the interests of local creditors were not prejudiced. The Working Group agreed and requested that the Secretariat prepare a draft to be considered at the next session.

Paragraph (4)

140. Suggestions were made to include the protection of debtor's interests among the conditions for granting or denying relief to the foreign representative. Some proponents of that view stated that it would be desirable to create a presumption that the debtor was not treated unfairly or that the foreign representative should not be required to prove that the debtor was treated fairly.

141. The Working Group decided to consider at its next session a draft provision along the following lines: "In granting or denying relief under this article, the court must be satisfied that creditors collectively and the debtor are protected against undue prejudice and will be given a fair opportunity to assert their claims and defences."

Paragraph (5)

142. There was broad agreement that the possibility to deny, modify or terminate relief provided in paragraph (5) also applied to "automatic" relief, i.e., stay of actions and stay of transfers of assets as provided by paragraph (2)(a). The question was raised whether such understanding of the provision did not take away much of the meaning of the automatic relief. However, it was stated in reply that one could not exclude the possibility of improper orders for recognition of a foreign main proceeding and that it was therefore useful to have the possibility to vacate under paragraph (5) such an improper order. The possibility to vacate improper orders was important in particular because such orders might be issued in ex parte proceedings.

143. The question was raised whether the words "relief granted or requested" meant that paragraph (5) offered an avenue for preventing the entry into effect of automatic relief under paragraph (2)(a). It was suggested in reply that it was not inconsistent with the automatic nature of relief under paragraph (2)(a) that the court had the power to deny the stay of actions or stay of transfers of assets as envisaged in paragraph (2)(a). Another view was that it was not the purpose of paragraph (5) to prevent automatic relief under paragraph (2)(a) from entering into effect.

144. It was suggested that the criteria under which relief might be denied, modified or terminated were to be found in paragraph (4) of article 12.

145. The Working Group agreed to consider at its next session an alternative wording to paragraph (5) along the following lines: "Nothing in foregoing provisions shall be construed as barring or restricting the power of the court to deny, modify or terminate any relief under this article". Another possible wording suggested was: "Upon request of a person or entity affected by relief, the court may deny, modify or terminate such relief".

Paragraph (6)

146. One view was that the paragraph stated the obvious and could be deleted. The prevailing view, however, was that the provision was useful in that it might stimulate the court to tailor relief to the particular circumstances of the case by attaching to the relief conditions or orders. The following possible redraft of the provision was offered for consideration at the next session of the Working Group: "A court granting relief to the foreign representative may subject such relief to any conditions it considers appropriate".

Recognition of foreign "main" and "non-main" proceedings

147. Having concluded the consideration of article 12, the Working Group considered the questions of recognition of a "main" proceeding (as referred to in article 11(1)(a)), recognition of a "non-main" proceeding (as referred to in article 11(1)(b)), and the consequences of recognition of a non-main proceeding. The Working Group decided that article 2 (Definitions) should contain definitions of main and non-main proceedings.

148. Views were expressed in favour of retaining the current approach, which linked automatic relief to recognition of a main proceeding and left relief in favour of both main and non-main proceedings to the discretion of the court. However, according to other opinions that approach should be modified.

149. One opinion was that only main proceedings should be recognized. That solution was defended on the ground that admitting recognition of non-main proceedings would make it difficult to coordinate among several insolvency proceedings. That view, however, received little support since it neglected the desirability for providing efficient relief in non-main proceedings.

150. Another opinion, which eventually received the endorsement of the Working Group, was that solutions should be sought on the basis of the following principles: recognition of both main and non-main proceedings; availability of appropriate relief in both types of proceedings; primacy of the main proceeding over non-main proceedings; limits as to the consequences of non-main proceedings; and coordination between main and non-main proceedings. In support of that opinion it was stated that the limits were necessary to diminish the possibility of several representatives in non-main proceedings competing for relief in one or more States. Regarding the way the limits of court discretion should be expressed, various proposals were made. The view was expressed, however, that the need for

complicated provisions concerning non-main proceedings might excessively complicate the Model Provisions.

151. One proposal was to require the foreign representative to state to the court the objectives of the foreign proceeding; such a statement would assist the court in determining whether and what kind of relief should be granted.

152. Another proposal was to distinguish the effects of the main proceeding from the effects of non-main proceedings. It was said that the scope of the discretion in the case of non-main proceedings should be narrower than in the case of main proceedings, and that guidelines or criteria along the lines of which discretion was restricted should be expressed in the Model Provisions. It was considered important to establish a hierarchy among concurrent proceedings and to accord relief in accordance with that hierarchy.

153. Yet another proposal was to limit the discretion of the court with reference to the list of types of measures in article 12(2)(b). It was said that measures referred to in subparagraphs (i) and (ii) should be reserved for main proceedings, whereas measures under subparagraphs (iii), (iv) and (v) could also be provided to non-main proceedings.

154. A further proposal was to provide in the Model Provisions that relief granted to non-main proceedings must be such that it does not interfere with the orderly carrying out of the main proceeding.

155. By way of a general observation, it was said that there were in particular two situations where it was not possible to adjust measures in non-main proceedings to the measures in the main proceeding: where it was not clear in which State was the centre of the debtor's main interests; and where it was not possible (e.g., for political reasons) to open the proceedings in the State where the debtor had the centre of its main interests, or where a main proceeding could not be opened sufficiently quickly in that State.

Article 13 (7 bis). Public policy exceptions

156. The text of the draft article before the Working Group was as follows:

> "Notwithstanding article 11, a court shall refuse to recognize a foreign proceeding or to grant relief under this Law where the effects of such recognition or relief would be manifestly contrary to public policy."

157. The Working Group was informed that in certain jurisdictions the Model Provisions could only be enacted in such a way that they would not conflict with certain fundamental rules and principles that formed the basis of their legal tradition. The Working Group took note of those remarks.

158. In response to a question as to the scope of application of article 13, which in its current wording was linked to the provision on recognition of foreign proceedings, the Working Group considered that the public policy exception should apply to the entirety of the Model Provisions. The Secretariat was requested to prepare a revised draft reflecting that consideration.

159. The Working Group noted that different legal systems used different formulations for expressing a public policy exception, and decided that, pending further discussions, the words "shall" and "may", to the extent they would be needed in the new draft, should appear in square brackets.

160. Suggestions were made concerning the word "manifestly", used as the qualifier of "public policy": the word should be deleted since it was not clear what it meant; if the word were to be kept, the Model Provisions should provide an explanation; in the context of international insolvency it was inappropriate to restrict the operation of public policy only to cases where the violation of it was manifest. According to another view, the qualifier should be kept in order to facilitate international cooperation and to avoid a situation where cooperation under the Model Provisions would be frustrated because the particular step or measure was seen to be contrary to a mere technicality of a mandatory nature. Furthermore, it was observed that the word was used in many international legal texts and that its objective and meaning were well understood: its purpose was to emphasize that public policy exceptions should be interpreted restrictively and that article 13 was only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State. Pending further discussion, it was decided to keep the word in square brackets.

Article 14 [10]. Discharge of obligations to debtor

161. The text of the draft article read as follows:

> "(1) Where an obligation has been honoured in the enacting State for the benefit of a debtor who is subject to foreign proceedings recognized in accordance with article 11, when it should have been honoured for the benefit of the foreign representative pursuant to relief provided to the foreign representative upon recognition, the person honouring the obligation shall be deemed to have discharged the obligation if the person was unaware of the foreign proceeding.
>
> "(2) Where an obligation referred to in paragraph (1) is honoured before notification in accordance with article 12(1)(b) and (2)(c) is made, the person honouring the obligation is presumed, in the absence of proof to the contrary, to have been unaware of the foreign proceeding; where the obligation is honoured after such notification, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been aware of the foreign proceeding."

162. The Working Group noted that article 14 restated rules on presumptions that existed in many jurisdictions. It was suggested that, by establishing harmonized rules on those presumptions, the Model Provisions would, on the one hand, foster legal certainty and, on the other hand, help recover assets that were transferred by the debtor in bad faith.

163. However, it was pointed out that the scope of the draft Model Provisions was limited to matters of judicial relief and cooperation and that the issues to which article 14 pertained could not be adequately dealt with in the Model Provisions, without addressing a number of other substantive issues which were not covered in the current text (such as set-offs and actions to reverse or render unenforceable legal acts

detrimental to all creditors, see above para. 134). After considering the different views expressed, the Working Group felt that, notwithstanding the importance of those rules in insolvency proceedings, it would be preferable for the Working Group not to attempt to provide a harmonized solution for that matter. It was therefore decided that article 14 should be deleted.

CHAPTER IV. COOPERATION WITH FOREIGN JURISDICTIONS

Article 15 [11]. Authorization of cooperation

164. The text of the draft article before the Working Group was as follows:

"(1) The courts of the enacting State, and administrators appointed in the enacting State, shall cooperate to the maximum extent possible with foreign courts or competent authorities and with foreign representatives.

"(2) The courts of the enacting State may request information or assistance directly from foreign courts or competent authorities in any matter relating to insolvency proceedings in the enacting State.

"(3) (a) Cooperation may be implemented by any appropriate means, including:

"(i) appointment of a person to act at the direction of the court;

"(ii) communication, by any means deemed appropriate by the court, of information, and coordination of the administration and supervision of the debtor's assets and affairs;

"(iii) approval or implementation by courts of arrangements concerning the coordination of proceedings;

"(iv) [... the enacting State may wish to list additional forms or examples of cooperation].

"(b) Cooperation with foreign courts or competent authorities and foreign representatives shall in all cases be subject to the procedural requirements of the court."

Paragraph (1)

165. The Working Group recalled and reaffirmed its views about the provision at its last session (A/CN.9/422, paras 130-134).

166. The Working Group expressed the understanding that the duty to cooperate as expressed in article 15 had a broad scope of application and covered contacts between courts, between insolvency administrators, between the court in the enacting State and a foreign representative, and between an administrator in the enacting State and a foreign court. However, it was recognized that the nature of those contacts differed and that those differences should be more clearly expressed in the provision. In particular, it was noted that cooperation between administrators was subject to court supervision; however, it was also noted that while the degree of control of courts over administrators varied, administrators were often expected to have a broad latitude in taking decisions. Furthermore, it was stated that it was particularly important to provide a clear statutory authority for courts to cooperate, which authority was in many legal systems lacking or was insufficient. In light of those considerations, it was decided to deal with cooperation involving administrators in a provision separate from the one on cooperation between courts.

167. It was decided not to use in the article the word "administrator" since many enacting States would use another term for the person or body appointed to administer debtors' assets.

168. It was suggested to use, in reference to the courts of the enacting State in paragraphs (1) and (2), such language that would express more clearly the fact that, typically, it would be only one or a limited number of courts in that State that would wish to cooperate with, or seek information from, foreign courts in respect of a given insolvency proceeding.

Paragraph (2)

169. It was decided that reference to "insolvency proceedings in the enacting State" in paragraph (2) (as well as in other places in the Model Provisions) should be aligned to the style used in article 1(b) and (c).

Subparagraph (3)(a)

170. A proposal was made to limit cooperation to measures available under local law. However, the prevailing view was that the substance of the subparagraph was acceptable. It was decided to split subparagraph (a)(ii) into two subparagraphs.

Subparagraph (3)(b)

171. The concern was expressed that subparagraph (b), as drafted, might, by subjecting cooperation to "the procedural requirements of the court", be interpreted as requiring the court to use procedures (e.g., communications via higher courts, letters rogatory or other special formalities to be used in written communications) that were meant to be relaxed or eliminated by article 15. It was noted in that regard that some procedural requirements might be regarded as a matter of public policy.

172. The Secretariat was requested to prepare a revised draft to meet that concern. One idea mentioned in that context was to suggest to enacting States (in the provision itself or in the guide to enactment) to specify the procedural requirements that did not apply to cooperation with foreign courts.

CHAPTER V. CONCURRENT PROCEEDINGS

Article 16 [18]. Concurrent proceedings

173. The text of the draft article before the Working Group was as follows:

> "(1) Where an insolvency proceeding has been opened in a foreign jurisdiction in which the debtor has the centre of its main interests, the courts of the enacting State shall have jurisdiction to open insolvency proceedings against the debtor only if the debtor has [an establishment] [or assets] in the enacting State[, and the effects of those proceedings shall be restricted to the [establishment] [or] [assets] of the debtor situated in the territory of the enacting State].
>
> "(2) Recognition of a foreign insolvency proceeding is, for the purposes of initiating proceedings in the enacting State referred to in paragraph (1) and in the absence of evidence to the contrary, proof that the debtor is insolvent."

Paragraph (1)

174. It was suggested and the Working Group agreed that it should be made clear that article 15 (on cooperation) applied in the case of concurrent proceedings covered by article 16.

175. The view was expressed that, while paragraph (1) was useful in fostering coordination among, and reduction of, multiple proceedings, the Model Provisions should go further and contain also a general rule on international jurisdiction for the opening of insolvency proceedings along the lines of article 3 of the European Union Convention on Insolvency Proceedings. In response it was stated that a rule on international jurisdiction went beyond the ambit of the project, gave rise to complex issues, and might reduce the acceptability of the Model Provisions. It was thus sufficient for the text to establish limits on the jurisdiction of the enacting State when that State recognized a foreign main insolvency proceeding. It was agreed that for the effects of paragraph (1) to be triggered, article 16(1) should make it clear that recognition of the foreign main proceeding was required.

176. Differing views were expressed as to whether, after recognition of a foreign main proceeding, the opening of a local proceeding should only be possible if the debtor had an establishment in the enacting State, or whether local proceedings were allowed to be opened with respect to assets that did not fall within the meaning of "establishment". The prevailing view was that it would be preferable to restrict the commencement of insolvency proceedings in the enacting State to those cases in which the debtor

had an establishment in the enacting State. It was felt that such an approach represented a meaningful and not overly ambitious step towards reducing multiple insolvency proceedings, and that such a solution was susceptible to acceptance by States. However, considerable support was also expressed for retaining reference to the presence of assets in the enacting State, since in some legal systems the courts had jurisdiction to open insolvency proceedings on the sole basis that the debtor had assets in the country. It was also stated that, as a compromise situation, one could consider allowing the opening of a non-main proceeding where assets, but not an "establishment", were present if certain conditions were fulfilled. It was felt the matter required further discussion and the Working Group decided to retain both options in square brackets in paragraph (1).

177. With a view to ensuring greater coordination, various interventions favoured the limitation of the effects of local proceedings to the establishment or assets of the debtor situated in the territory of the enacting State, as was provided in the European Union Convention on Insolvency Proceedings. The countervailing view, however, was that, while the recognition of the foreign main proceedings had far-reaching consequences under the European Union Convention, the draft Model Provisions provided limited effects to the recognition of the foreign proceedings (i.e., stay of actions and of transfer of assets and other relief that might be provided under article 12). Therefore, it would not be advisable to retain such a limitation in article 16. Having noted the differing views expressed, the Working Group felt that the matter required further consideration at the next session.

178. A suggestion was made that an option be provided whereby the enacting States could limit the application of paragraph (1) to recognition of foreign main proceedings emanating from countries listed in an annex to the Model Provisions. It was said that the reason for that suggestion was the fact that paragraph (1) dealt with court jurisdiction, a matter that went beyond the original scope of the draft Model Provisions, which was access of foreign representatives to local courts and recognition of foreign insolvency proceedings.

179. It was suggested that article 16 could provide for the possibility of authorizing the court to terminate or suspend a local proceeding upon recognition of a foreign main proceeding. It was also suggested that article 16 should provide, in a separate paragraph, a rule whereby the recognition of a foreign main proceeding would preclude the opening of a local main proceeding in respect of the same debtor. It was further suggested that the existence of local proceedings should constitute grounds for barring the recognition of a foreign proceeding. The Working Group felt that those suggestions required further consideration and agreed to revert to them at its next session.

Paragraph (2)

180. It was noted that different legal systems provided different criteria for proving that the debtor was insolvent; the question was raised as to what was the effect of paragraph (2) on those criteria. While it was stated in reply that it was the purpose of paragraph (2) to facilitate such proof when a foreign insolvency proceeding was recognized, it was suggested that clarification of the interplay between those local criteria and the presumption would be desirable.

181. It was suggested that paragraph (2) should refer only to foreign main proceedings and that consideration should be given to moving the paragraph to article 9.

Article 17 [19]. Rate of payment of creditors

182. The text of the draft article, as considered by the Working Group, was as follows:

> "Without prejudice to [secured claims] [rights in rem], a creditor who has received part payment in respect of its claim in an insolvency proceeding opened in another State may not receive a payment for the same claim in an insolvency proceeding opened with regard to the same debtor in the enacting State, so long as the payment to the other creditors of the same class for their claims in the proceeding opened in the enacting State is proportionately less than the payment the creditor has already received."

183. The Working Group generally agreed that article 17 was useful. However, it was noted that the current text raised some difficulties, such as the different meanings that might be attributed to the expression "same class" in different legal systems. It was agreed that the expressions "secured claims" and "rights in rem" should be kept in square brackets as options to be chosen by the enacting State. The Working Group decided to continue its consideration of the article at its next session.

C. Other matters

Official administrators

184. It was stated that, in the context of article 15, as well as in the broader context of the Model Provisions, it would be useful to make express reference to the fact that in some States a number of important obligations and rights regarding insolvency proceedings were by law conferred upon State-appointed officials (the titles of those officials differed and included expressions such as official receiver or insolvency regulator). Those officials might act on the basis of the statutory authority or might be regularly called upon by courts to intervene in insolvency proceedings. In some States the scope of the functions of such officials was quite broad while in others it was limited. The Working Group agreed to discuss at its next session what would be the best way to refer to those officials in the Model Provisions, with a view to making it clear that nothing in the Model Provisions displaced any of the provisions in force in the enacting State concerning the duties and obligations of those officials. The Secretariat was requested to prepare a draft for consideration at the following session.